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04 UNITED STATES DISTRICT COURT  
05 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

06 IVY BYRD GAINES, ) CASE NO. C08-0050-TSZ-MAT  
07 ) (CR03-496-TSZ)  
Petitioner, )  
08 )  
v. ) REPORT AND RECOMMENDATION  
09 )  
UNITED STATES OF AMERICA, )  
10 )  
Respondent. )  
\_\_\_\_\_ )

11  
12 INTRODUCTION AND SUMMARY CONCLUSION

13 Petitioner Ivy Byrd Gaines is a federal prisoner who is currently incarcerated at the United  
14 States Penitentiary at Tucson, Arizona. He has filed a motion pursuant to 28 U.S.C. §2255  
15 seeking to vacate, set aside, or correct the sentence imposed upon him following his 2005 federal  
16 conviction on charges of robbery, interfering with commerce by robbery, and using a firearm  
17 during a crime of violence. Respondent has filed an answer to petitioner's § 2255 motion, and  
18 petitioner has filed a traverse to respondent's answer. After careful consideration of petitioner's  
19 motion, the briefs of the parties, and the balance of the record, this Court concludes that  
20 petitioner's §2255 motion should be denied.

21 BACKGROUND

22 On March 22, 2005, petitioner was convicted, following a jury trial, of ten counts of

01 robbery or interfering with commerce by robbery, and eight counts of using a firearm during a  
02 crime of violence. (CR03-496-TSZ, Dkt. Nos. 83 and 84.) On July 8, 2005, petitioner was  
03 sentenced to a term of 595 days imprisonment on the robbery counts and to a consecutive term  
04 of 182 years imprisonment on the firearms counts. (*Id.*, Dkt. Nos. 93 and 94.)

05 Petitioner appealed his convictions and sentence to the United States Court of Appeals for  
06 the Ninth Circuit. (*Id.*, Dkt. No. 95.) On appeal, petitioner challenged the district court's  
07 admission of show-up, line-up, and in-court witness identifications, the district court's admission  
08 of a statement made by petitioner to a police officer following his arrest, the conduct of the  
09 prosecutor during rebuttal argument, and the length of his sentence. (*See* Dkt. No. 9, Ex. B.) On  
10 September 5, 2006, the Ninth Circuit affirmed petitioner's convictions and sentence. (*Id.*)  
11 Petitioner thereafter filed a petition for writ of certiorari. *See Gaines v. United States*, 127 S.Ct.  
12 1022 (2007). The United States Supreme Court denied the petition on January 8, 2007. *Id.*

13 On January 14, 2008, this Court received for filing petitioner's motion to vacate, set aside,  
14 or correct his sentence under 28 U.S.C. § 2255. Petitioner identifies two grounds for relief in his  
15 motion and his supporting papers: (1) ineffective assistance of counsel; and, (2) prosecutorial  
16 misconduct. (*See* Dkt. No. 1 at 4-5.) Both of petitioner's claims appear to arise out of the  
17 government's alleged failure to produce exculpatory evidence prior to petitioner's trial. The  
18 government filed a timely answer to petitioner's motion on March 3, 2008, and petitioner filed a  
19 traverse to the government's answer on June 12, 2008. (Dkt. Nos. 9 and 12.) The briefing is now  
20 complete and petitioner's § 2255 motion is ripe for review.

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01 DISCUSSION

02 Exculpatory Evidence

03 Petitioner asserts in his § 2255 motion that he is entitled to a new trial because exculpatory  
04 evidence was withheld during the discovery process which deprived petitioner of the ability to  
05 present a complete and adequate defense. Petitioner appears to fault his trial counsel for failing  
06 to obtain the evidence, his appellate counsel for failing to pursue claims regarding the withheld  
07 evidence on appeal, and the prosecution for failing to disclose the evidence. The evidence at issue  
08 is evidence which petitioner speculates is contained in files maintained by the FBI in its so-called  
09 “I-drive” system. Petitioner does not identify in his motion papers what information he believes  
10 the FBI may have concerning his offenses in their “I-drive” system files. He appears certain,  
11 however, that such information exists and that it would be exculpatory.

12 The difficulty petitioner confronts in these proceedings is that in order to establish that he  
13 is entitled to relief, he must provide the Court with more than just speculation and conclusory  
14 allegations of harm. *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations  
15 which are not supported by a statement of specific facts do not warrant habeas relief.”). For  
16 example, in order to establish that his counsel rendered ineffective assistance, petitioner must  
17 demonstrate that his counsel’s performance fell below an objective standard of reasonableness~~and~~,  
18 that he was prejudiced by counsel’s alleged deficient conduct. *See Strickland v. Washington*, 466  
19 U.S. 668, 691-92 (1984). While petitioner alleges that his trial counsel should have obtained  
20 additional evidence to aid in petitioner’s defense, and that his appellate counsel should have  
21 pursued issues concerning the allegedly withheld evidence on appeal, the Court can make no  
22 assessment of whether counsels’ conduct was unreasonable or prejudicial without some showing

01 from petitioner as to the specific nature of the evidence he believes was withheld.

02 In order to establish that he is entitled to relief on his claim that the government withheld  
03 exculpatory evidence in violation of its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963),  
04 petitioner must establish that (1) the evidence was exculpatory or impeaching, (2) it should have  
05 been, but was not produced and (3) it was material to his guilt or punishment. *See Paradis v.*  
06 *Arave*, 130 F.3d 385, 392 (9th Cir . 1997). Again, without some showing from petitioner as to  
07 the specific nature of the evidence he believes was withheld, this Court can draw no conclusions  
08 as to whether the failure to produce such evidence entitles petitioner to the new trial he seeks.

09 Petitioner simply offers no specific facts which would allow this Court to properly evaluate  
10 any of petitioner's claims regarding the allegedly withheld evidence. Petitioner has submitted in  
11 conjunction with his motion documents which are apparently intended to demonstrate that the FBI  
12 has files in its possession which were never disclosed in petitioner's case. (*See* Dkt. No. 1 at 34-  
13 36.) The documents discuss an FBI practice of screening investigatory documents and placing  
14 only those which are approved by a supervisory agent in the official case file. ( *Id.*) Those  
15 investigatory documents which are not approved are purportedly placed in a shared drive on FBI  
16 field office computer networks, known internally as the "I-drive," and are not accessible even to  
17 prosecutors who are responsible for locating and producing exculpatory evidence to the defense.  
18 (*Id.*)

19 Assuming that the "I-drive" system does, in fact, exist, and that such a system has, on  
20 occasion, resulted in the failure of the government to meet its *Brady* obligations in certain federal  
21 prosecution, it remains incumbent upon petitioner to show that this is what happened in his case.

Petitioner makes no such showing here.<sup>1</sup> Accordingly, petitioner's claims relating to the "I-drive" system files should be denied.

#### Prosecutorial Misconduct

Petitioner presents one additional claim in his § 2255 motion papers that is unrelated to the "I-drive" system files. Specifically, petitioner asserts that the prosecutor committed misconduct by using the words "liar" and "lied" during closing argument. The record before this Court reveals that petitioner raised an identical claim on direct appeal of his conviction which was rejected by the Ninth Circuit. (Dkt. No. 9, Ex. B at 9.) Claims that have already been raised on direct appeal may not be raised in subsequent § 2255 motions absent a showing of manifest injustice or a change in law. *Polizzi v. United States*, 550 F.2d 1133, 1135 (9th Cir. 1976), citing *Kaufman v. United States*, 394 U.S. 217, 226-27 & n.8 (1969). Petitioner makes no such showing here. Accordingly, this portion of petitioner's prosecutorial misconduct claim should also be denied.

#### CONCLUSION

As none of petitioner's claims has merit, this Court recommends that petitioner's § 2255 motion be denied. A proposed order accompanies this Report and Recommendation.

DATED this 17th day of July, 2008.



Mary Alice Theiler  
United States Magistrate Judge

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<sup>1</sup> As the government makes clear in its thorough and well-drafted answer to petitioner's somewhat cryptic § 2255 motion, the evidence of petitioner's guilt was substantial. It is difficult to envision what type of evidence might have been contained in these purportedly hidden FBI files which could have altered the actual outcome of petitioner's trial.